No. 85-1695

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

SOCIÉTÉ NATIONALE INDUSTRIELLE AÉROSPATIALE AND SOCIÉTÉ DE CONSTRUCTION D'AVIONS DE TOURISME,
Petitioners,

VS.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IOWA,
Respondent.

(DENNIS JONES, JOHN and ROSA GEORGE,
Real Parties In Interest)

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

REPLY BRIEF

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REPLY BRIEF

The common thread running through all presentations of the issues in this case is the reluctance and unwillingness of many lower courts to give effect to the Hague Evidence Convention. When a U.S. court rules that adherence to the Convention's procedures is unnecessary to obtain documents or information located abroad, the court creates a conflict with foreign law which

could otherwise have been avoided. The Convention's procedures can be circumvented through an unstructured, result-oriented comity analysis, just as its strictures can be avoided through a finding that the Convention does not apply based on the court's jurisdictional power over a foreign party. Lower courts have done both. The challenge which this case presents is how to formulate a rule of general applicability which gives effect to the intent of the treaty's signators without unduly hampering the power of U.S. courts.

The specific task before the Court is to harmonize the Hague Evidence Convention with federal discovery rules. Both the Convention and the federal discovery rules are U.S. law. An analysis which asks whether a court should "defer" to the Convention under the principle of international comity is misguided; such an analysis treats the Convention as if it were foreign law. Jurisprudence applying the principle of international comity is relevant to the issues before the Court primarily because the Court has had extensive experience in its application, and a proper analysis of comity considerations provides additional support for a first-use rule. The issue before the Court, however, is how to give effect to the Convention, *not* how to define the principle of comity or whether its application requires discretion.

Respondents attempt in several ways to divert the Court from the task of harmonizing the Convention with the federal rules. They incorrectly state the central issue in this case as whether the Convention "supplants" federal discovery rules. The purpose of this legerdemain is to paint the question before the Court as an all-or-nothing choice: either the Convention is exclusive or, as respondents would have the Court conclude, it is a purely optional method of discovery. Respondents also claim that the Convention has no applicability to the discovery here in issue; hence the question of how to harmonize the federal rules with the Convention never arises for respondents. Finally, they offer a speculative and conclusory comity analysis which, as a practical matter, would almost never require use of the Convention where discovery under the federal rules is possible.

Respondents' arguments that the Convention's procedures are burdensome or are not an effective means to obtain evidence from

a foreign litigant are based on speculation rather than on anything of record. The government of France, appearing as amicus curiae, has explained fully how the Convention can be used efficiently and effectively to obtain evidence located in France, and petitioners have pledged themselves to cooperate in its use. Thus, resort to the Convention should be required here, both on the facts of this case and as implementation of a general rule designed to effectuate the intent of the Convention.

I
A RULE OF GENERAL APPLICABILITY IS MUCH NEEDED

There is considerable confusion among the lower courts about when the procedures of the Hague Evidence Convention should be used to gather evidence abroad. Some courts have ruled that the Hague Evidence Convention is the exclusive means for obtaining evidence located abroad.[1] Other courts have approached the question through a balancing of comity considerations but have reached different results in situations which do not appear readily distinguishable from one another.[2] Yet other courts, like the court below, have attempted to avoid the hard questions inherent in the case-by-case comity approach by holding that the Convention is not applicable when a court orders a

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[1] *See, e.g., Rockwell Int'l Corp. v. Costruzione Aeronautiche Giovanni Agusta, S.P.A.*, No. 81-3984 (E.D. Pa. May 17, 1983) (order *reversing* order of Mar. 21, 1983); *Cannon v. Arburg Maschinenfabrik*, No. 80 L 2275 (Ill. Cir. Ct. July 21, 1983); *Cuisinarts, Inc. v. Robot Coupe, S.A.*, No. CV 80 0050083 (Conn. Super. Ct. July 22, 1982) (memorandum of decision on motion for disclosure from a foreign corporation under the Hague Convention).

[2] "Understandably, if the concept of international comity lies somewhere between 'absolute obligation,' on the one hand, and 'mere courtesy and good will' on the other, as the United States Supreme Court suggested in *Hilton v. Guyot*, 159 U.S. at 163-64, 16 S.Ct. at 143, 40 L.Ed. at 108, different conclusions may be reached under substantially similar sets of circumstances." *Gebr. Eickhoff Maschinfabrik und Eisengieberei GmbH v. Starcher*, 328 S.E. 2d 492, 505 (W.Va. 1985) (reviewing conflicting decisions).

corporation over whom it has jurisdiction to produce evidence in the United States "even though the documents and information sought may physically be located within the territory of a foreign signatory to the Convention." 782 F.2d at 124, Pet. App. at 4a.[3]

Directing the lower courts to decide whether to make use of the Convention through a case-by-case analysis of domestic and foreign interests will not lessen this confusion. An ad hoc comity approach generates no rules to guide the lower courts. Moreover, clear rules cannot be expected to emerge from appellate supervision of a case-by-case approach. The question of whether to make use of the Convention typically arises in discovery. Rulings on such matters are reviewable before judgment only by extraordinary writ, and such review is by its nature difficult to obtain.[4]

There are significant practical difficulties for the lower courts in performing a case-by-case analysis of domestic and foreign interests. Because the question of whether to require adherence to Convention procedures generally arises in discovery, courts are often called upon to balance comity considerations on the basis of a scanty factual record, especially where no use of the Convention has been attempted. Not surprisingly, many trial court findings are conclusory and result-oriented.[5]

Inconsistent results and continuing uncertainty for litigants are the practical consequences of a case-by-case approach. As one trial court recently observed, "international civil litigants might benefit from the formulation of standards more reproducible in their application than the necessarily fact-laden comity inquiry."

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[3] *See, e.g., In re Anschuetz & Co. GmbH*, 754 F.2d 602, 611 (5th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3084 (U.S. Aug. 13, 1985) (No. 85-98); *Lowrance v. Michael Weinig, GmbH & Co.*, 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985); *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 521 (N.D. Ill. 1984).

[4] *See Boreri v. Fiat S.P.A.*, 763 F.2d 17, 20 (1st Cir. 1985) (refusing to address merits of mandamus petition raising question of interplay between Hague Evidence Convention and Federal Rules of Civil Procedure).

[5] *See* Brief for Petitioners at 43-45.

S&S Screw Machine Co. v. Cosa Corp., No. 2-85-0036, slip op. at 39 (M.D. Tenn. Oct. 17, 1986). A rule requiring use of the Convention in the first instance would implement the treaty's intent and would produce consistent results in the lower courts.

II

A RULE REQUIRING FIRST USE OF THE CONVENTION WOULD HARMONIZE IT WITH FEDERAL DISCOVERY RULES

The central issue before the Court is how to harmonize the Hague Evidence Convention with federal discovery rules. By focusing exclusively on a comity analysis which treats the Convention as if it were foreign law, the Solicitor General has failed to address this issue. A first-use rule effectuates the Convention's intent and is supported by a proper analysis of comity considerations which, unlike the analyses proffered by the Solicitor General and respondents, does not denigrate the significance of foreign sovereign interests.

A. By Focusing Exclusively on Comity, the Solicitor General Fails to Address the Central Issue in This Case

The issue before the Court is what legal obligations were created by U.S. ratification of the Convention and how to effectuate the treaty's intent. The Convention represents a balancing of sovereign interests intended to avoid conflicts between different legal systems. Like the Convention, the principle of comity seeks to accommodate foreign interests, insofar as that is consistent with U.S. interests, by tempering the exercise of sovereign powers. Because of the similarities between the concerns underlying the Convention and those expressed by the principle of comity, it is a relevant or useful concept in establishing a general rule concerning the Convention's use.[6] The issue before the Court,

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[6] The Court has applied this principle in many contexts to formulate general rules. *See* Brief for Petitioners at 37 & n.84; Brief for Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH as Amicus Curiae in Support of Petitioners at 16-18. In the landmark case of

however, is not how to define the "American concept of international comity" or whether it "favors an individualized, case-by-case weighing of domestic and foreign interests,"[7] but rather how to give effect to the Convention.

The Solicitor General addresses use of the Convention as if the United States were not a party to it. Hence the Solicitor General is silent on how to harmonize the Convention with the federal rules. Instead, it contends that a U.S. court needs to consider use of the Convention only when "it encounters objections to domestic discovery from a foreign signatory"[8] and that, in those cases, the court should decide whether to honor such objections on the basis of an "individualized comity analysis" in which the foreign nation must show "specific and concrete interests that merit accommodation from United States courts."[9] Thus, what the Solicitor General proposes is effectively a presumption of disuse, which foreign nations and foreign litigants would bear the burden of rebutting.

This viewpoint fails to give effect to the treaty's intent and treats its procedures as if they were foreign law. By ratifying the Convention, the United States has pledged itself both to mutual judicial assistance through Convention procedures and to self-restraint in use of its own methods for gathering evidence abroad.

The history of the Convention shows that it was adopted in large measure to avoid the friction created by the extraterritorial

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Hilton v. Guyot, 159 US. 113, 163-66 (1895), the Court utilized the principle of comity to establish a rule that judgments of competent foreign courts having jurisdiction over parties will be enforced in the United States absent a showing of either fraud in obtaining the judgment or a violation of public policy. This general rule has now been formulated as a uniform statute adopted by some 16 states. *See* Uniform Foreign Money-Judgments Recognition Act §§ 3-4, 13 U.L.A. 265, 268 (1986).

[7] Brief for the United States and Securities and Exchange Commission as Amici Curiae at 12.

[8] *Id.* at 11.

[9] *Id.* at 25.

application of domestic discovery procedures. In negotiation of the treaty, the United States obtained important concessions from the civil law nations on the basis that the Convention's procedures would be a substitute for the unsupervised extraterritorial use of federal discovery rules which those nations regard as oppressive and invasive of their sovereign rights. *See* Brief for Petitioners at 23-28.[10] In light of this history, the Court should adopt a rule favoring the Convention's use and placing the burden of proving futility on those who would conduct discovery under domestic rules without ever attempting to obtain evidence under the Convention. Requiring instead that foreign nations and foreign litigants demonstrate a "specific and concrete" interest in the use of Convention procedures on the individual facts of each case would fail to effectuate the treaty's intent and would relegate the treaty to disuse.

B. A First-Use Rule Effectuates the Convention's Intent

Where, as here, a U.S. court rules that adherence to Convention procedures is unnecessary to obtain documents or information located in France, the court creates a conflict with foreign law which could otherwise have been avoided. The Convention was designed to prevent such conflicts. A rule requiring use of the Convention in the first instance accommodates foreign sovereign interests without surrendering U.S. judicial power. Respondents' arguments to the contrary misread the Convention's history, improperly construe article 27 of the Convention, treat the Con-

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[10] Even courts which have refused to apply the Convention recognize the accuracy of this statement of the treaty's intent. Thus, in *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. at 519-520, the court stated:

> It cannot be denied that foreign displeasure with American discovery procedures played some part in shaping the Convention, ...
>
> . . . .
>
> It is fair to assume that the availability of the Convention procedures was intended to discourage, and possibly to preempt, the taking of evidence within a signatory state's borders without securing local judicial approval or cooperation whether the evidence is to be taken from a party or a non-party witness.

vention as if it were not U.S. law, and confuse jurisdictional power with the propriety of its exercise.

1. Respondents Misread the Convention's Ratification History

In arguing against any rule requiring the Convention's use, respondents place great reliance on a statement by a member of the U.S. delegation that the Convention "makes no major changes in United States procedure and requires no major changes in United States legislation or rules." Amram, *The Proposed Convention on the Taking of Evidence Abroad,* 55 A.B.A. J. 651, 655 (1969).[11] This reliance is misplaced. In context, this statement meant only that no U.S. legislation was required to implement the Convention because legislation and rules already in effect would do so.

Amram's central point is that the Convention preserves all more favorable and less restrictive practices for gathering evidence available under the domestic law of the nation in which the evidence is located or under other applicable treaties. He discusses in some detail the 1964 amendments to Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781-82 which "offer to foreign countries and litigants, without the requirement of reciprocity, wide judicial assistance on a unilateral basis for the obtaining of evidence in the United States." 55 A.B.A. J. at 651. Amram assures the reader that "the liberal and open practice in the United States under 28 U.S.C. § 1782, Section 3.02 of the Uniform Interstate and International Procedure Act and the law in most of the fifty states will remain unchanged." *Id.* at 652 n.8.

Respondents' interpretation of Amram's words as a promise that ratification of the Convention, and thus its adoption as U.S. law, would create no obligations for U.S. litigants or U.S. courts is strained and improbable. The United States had already provided

[11] The Solicitor General likewise relies upon this statement to support its assertion that the Convention's ratification history does not support a first-use rule. Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 14.

foreign litigants seeking evidence in the United States more liberal and less restrictive practices than those of the Convention. If the Convention creates no obligations on U.S. courts to make use of its procedures, then the treaty amounts to nothing more than unilateral concessions by the civil law nations.[12] Significantly, each of the foreign signators which has appeared before the Court insists that the Convention creates an obligation to make use of its procedures, at least in the first instance, where the use of domestic procedures would run afoul of the law of another contracting nation.[13]

2. Respondents Improperly Construe Article 27 of the Convention

Article 27 is the provision of the Convention which, in Amram's words, "[p]reserve[s] all more favorable and less restrictive practices." 55 A.B.A. J. at 652. It states, inter alia, that the Convention "shall not prevent" a signator from "permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." Pet. App. 35a.[14] Respondents erroneously contend that article 27 preserves alternative methods of the requesting state for gathering evidence abroad. The negotiation and ratification history of article 27 shows, however, that it was intended only to permit the nation where

[12] This is a highly improbable explanation for the negotiating behavior of foreign governments. *See* Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention,* 37 U. Miami L. Rev. 733, 760-61 (1983).

[13] *See* Brief of Amicus Curiae the Republic of France in Support of Petitioners at 8-9 (the Convention "sets forth mandatory procedures by which evidence located abroad may alone be sought, unless the foreign sovereign permits otherwise"); Brief of the Federal Republic of Germany as Amicus Curiae at 13-17; Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners at 8.

[14] Additionally, articles 28 and 32 permit bilateral or multilateral agreements among the Contracting States on matters covered by the Convention.

evidence is being sought to supplement the Convention through domestic procedures.

The explanatory report prepared after the Convention was completed and signed describes article 27 as "designed to preserve existing internal law and practice in a Contracting State which provides broader, more generous and less restrictive rules of international cooperation in the taking of evidence for the benefit of foreign courts and litigants." Conférence de La Haye de Droit International Privé, IV *Actes et Documents de la Onzième Session, Obtention des Preuves à l'Étranger* 215 (Bureau Permanent de la Conférence ed. 1970). The discussion which follows makes clear that article 27 authorizes the use of alternative methods for gathering evidence but only "if the internal law or practice of the *State of execution* so permits." *Id.* (emphasis supplied). These statements are echoed in the report which accompanied the Convention's transmittal to Congress. *See* S. Exec. A, 92d Cong., 2d Sess. 39-40 (1972) (identical statements).

The Convention was intended to improve mutual judicial cooperation and to avoid conflicts among contracting states over evidence gathering activities within another state's borders. Respondents' reading of article 27 defeats this purpose. "[V]iewed in light of the underlying policies [article 27] permits only the country in which the evidence is being sought to supplement unilaterally the convention procedures with its internal rules." *Philadelphia Gear Corp. v. American Pfauter Corp.*, 100 F.R.D. 58, 60 (E.D. Pa. 1983).

3. Respondents Treat the Convention as if It Were Not U.S. Law and Confuse Judicial Power With the Propriety of Its Exercise

Respondents argue at length that the Convention is not the mandatory and exclusive means through which evidence located in a foreign signator can be obtained for use in U.S. litigation. Respondents would have the Court conclude that, if the Convention is not exclusive, U.S. litigants are free to disregard it. This false dichotomy treats the Convention as if it were not U.S. law. It also fails to distinguish between the existence of judicial power and the extent to which its exercise is appropriate. A rule of first use does not divest U.S. courts of judicial power but rather

implements a treaty obligation of the United States by requiring closer judicial supervision of discovery directed at evidence located in the territory of a foreign signator.

The Hague Evidence Convention, like the Federal Rules of Civil Procedure, is a law of the United States which the courts are required to interpret and administer. The federal rules contain provisions which contemplate the use of special procedures for discovery related to transnational litigation both in U.S. courts and abroad,[15] and the Convention establishes such procedures. The issue before the Court is how to harmonize the Convention with the federal rules, not, as respondents state, whether the Convention "supplants" the federal rules. A rule requiring first resort to the Convention where both apply gives effect to each. *See Watt v. Alaska*, 451 U.S. 259, 267 (1981).

A first-use rule does not divest U.S. courts of jurisdiction over foreign litigants as respondents claim. U.S. courts will retain their power under the federal rules to compel discovery, to draw adverse inferences from failures to produce evidence, or to impose other sanctions. In determining whether such measures are appropriate and in fashioning an appropriate order, the court will have the benefit of a developed record.[16]

Respondents' argument that the Convention's procedures are merely optional rests on a confusion of judicial power with the propriety of its exercise. "The existence of the power to order a thing done does not resolve the question of the propriety of exercising that power, particularly in the international context." Oxman, 37 U. Miami L. Rev. at 740. In the international context, courts must be concerned not only with fairness to individual litigants but also with maintaining stability and order in our dealings with separate territorial sovereignties. *See Lauritzen v. Larson*, 345 U.S. 571, 582 (1953).[17] The assertion of extraterrito-

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[15] Rule 28(b); *see* Brief for Petitioners at 31-32 & n.75.

[16] *See* Brief for Petitioners at 35.

[17] *See also* Brief for Petitioners at 29-31 & n.69. In the context of interstate commerce, the full faith and credit clause and the authority of the Court to interpret the Constitution provide a basis for resolving the

rial jurisdiction on the basis of "minimum contacts" does not relieve U.S. courts from the obligations of international judicial cooperation and restraint imposed by the Convention.

The Court's modern decisions have recognized that personal jurisdiction over a corporate defendant is a fluid concept based upon evaluation of a variety of factors and that the "presence" of a corporation in a forum or its "consent" to suit are merely constructs or legal fictions expressing a result.[18] These decisions eschew the mechanical application of rigid categories in favor of a flexible approach which considers fairness to litigants as well as territorial limits in determining what cases a court may hear.[19] The immediate effect of the Court's decisions permitting a forum to adjudicate any dispute between persons with whom it has the requisite "minimum contacts" has been to expand the reach of U.S. courts.[20] Yet the Court has also recognized the tension between concurrent jurisdiction and the sovereign powers of individual states.[21]

Precisely because U.S. courts have assumed broad extraterritorial jurisdiction, some deference to the interests of foreign sovereignties is required in the exercise of this power. The Convention creates an obligation of cooperation and restraint which respondents would have the Court ignore.

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potential conflicts arising from concurrent jurisdictions. In the international context, there is no similar structure within which to harmonize concurrent jurisdictions. *See* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 287-88 (1982). Insofar as a rational ordering of governmental relationships is possible, it must be achieved through treaties such as the Hague Evidence Convention or, in the absence of an applicable treaty, through the principle of comity.

[18] *See International Shoe Co. v. Washington*, 326 U.S. 310, 316-18 (1945).

[19] *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977); *International Shoe Co. v. Washington*, 326 U.S. at 319.

[20] *See Shaffer v. Heitner*, 433 U.S. at 204-05.

[21] *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 293.

C. A First-Use Rule Is Supported by a Proper Analysis of Comity Considerations

By giving effect to the Convention, which represents a weighing and balancing of sovereign interests, the Court can avoid the task of balancing these interests itself. A proper balancing of such considerations, however, also supports a rule of first use. A first-use rule will avoid conflicts with French law and yet will not compromise the U.S. interest in assuring that "domestic litigants are afforded adequate opportunities to adjudicate their claims."[22] In discussing comity, both respondents and the Solicitor General improperly denigrate France's interest in regulating evidence gathering activities conducted on French soil. A proper analysis of comity considerations does not permit such second-guessing of foreign sovereign interests.

1. A First-Use Rule Accommodates the Interest of France in Regulating Evidence Gathering in French Territory

In domestic actions, French law, like that of most civil law jurisdictions, vests in the judge rather than the parties responsibility for the discovery of evidence. The Republic of France has informed the Court that the taking of evidence on French territory requires the involvement or consent of the sovereign even where the evidence is to be used in proceedings abroad.[23] The Republic of France ratified the Convention intending it to provide the sole means by which discovery demands emanating from other signatory countries would be carried out on French soil.[24] To prevent the Convention's procedures from being circumvented by foreign litigants, France has enacted a blocking statute. The statute gives France the judicial means to put an end to practices which it regards as infringing on French sovereignty.[25]

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[22] Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 21.

[23] Brief of Amicus Curiae the Republic of France in Support of Petitioners at 7-8.

[24] *Id.* at 2.

[25] *See* National Assembly Report No. 1814, A. Mayoud, Reporter for the Commission on Production and Exchanges, 36-37 (1980); Brief of

France could not have stated more clearly or unambiguously its strong interest in the use of Convention procedures by American litigants seeking evidence located in French territory. Attempts to gather evidence in France through other means violate its blocking statute as well as its judicial sovereignty. A rule requiring use of the Convention in the first instance accommodates this clearly articulated sovereign interest of France and, because relevant and necessary evidence can be collected through Convention procedures, holds conflicts between U.S. and French law to a minimum.

2. Respondents' and the Solicitor General's Proposed Comity Analyses Improperly Discount France's Statements of Its Own Sovereign Interests

Respondents baldly assert that France has "no vital interest involved in this litigation."[26] The Solicitor General's views are more circumspect and were formulated without the benefit of having seen the amicus brief filed by the Republic of France. Nonetheless, the Solicitor General's suggestions concerning a comity analysis do not give proper weight to the foreign sovereign interests at stake.

The Solicitor General's suggestion that a "more specific and concrete" interest must be found before resort to the Convention is justified improperly discounts France's statements of its own interests. In effect, the Solicitor General would require nations which follow the civil law tradition to justify their limitations on foreign evidence gathering in American common-law terms. While the Solicitor General recognizes the danger "that unbridled American discovery will infringe substantive protections" provided by foreign law,[27] it fails to recognize that the judicially controlled evidence gathering procedures followed in France and

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Amicus Curiae the Republic of France in Support of Petitioners at 12-14; Brief for Petitioners at 13-14.

[26] Brief for Respondent and Real Parties in Interest at 27.

[27] Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 25.

other civil law nations are themselves substantive protections provided to those countries' citizens.[28]

The Solicitor General's suggestion that whether the Convention is used should depend upon the nature or scope of the discovery in question likewise discounts France's statements of its own sovereign interests. Under French law, written discovery no less than depositions requires the involvement or consent of the sovereign. The procedures of the Convention provide for this involvement or consent.[29] The degree of intrusiveness of particular discovery requests is an appropriate factor for U.S. courts to consider only in deciding whether to compel discovery under the federal rules after Convention procedures have been exhausted.[30]

3. A First-Use Rule is Workable and Does Not Compromise the U.S. Interest in Assuring Domestic Litigants an Opportunity to Adjudicate Their Claims

The Convention provides efficient and effective procedures for obtaining evidence located in France.[31] Although Convention procedures are not in every instance precise equivalents or substitutes for federal discovery rules, the courts' broad power to control the discovery process can prevent any potential unfairness

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[28] *See* Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 861-62 (1985); Brief for Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH as Amici Curiae in Support of Petitioners at 10-13.

[29] *See* Brief of Amicus Curiae the Republic of France in Support of Petitioners at 7-8 & n.8.

[30] The Brief for Compania Gijonesa de Navigacion, S.A. as Amicus Curiae in Support of Respondent carries the Solicitor General's "intrusiveness" argument further, asserting that Convention procedures should not be used if the discovery requests are (by American standards) "routine." Not only does this argument denigrate the significance of foreign sovereign interests, it would have courts disregard the Convention in precisely those situations where its use is likely to be most effective.

[31] *See* Brief for Petitioners at 39-41; Brief of Amicus Curiae the Republic of France in Support of Petitioners at 18-27.

to domestic litigants which arguably could result from requiring use of Convention procedures. Further, should use of the Convention fail to produce necessary evidence, courts would, under a first-use rule, retain the power to order production and impose appropriate sanctions for non-compliance.

Convention procedures provide a full range of discovery options for obtaining evidence located in France.[32] Use of the Convention procedures is not unduly expensive, time-consuming or burdensome, and, contrary to respondents' suggestion, the Convention can be used to obtain relevant documents located in France.[33]

Domestic discovery procedures within the United States are not without costs, delays and potential for obstruction. Efforts to obtain evidence under domestic procedures can require costly and time-consuming discovery battles and may require employing local counsel as well as transcontinental or even international travel. In comparison, Convention procedures may often prove more economical and efficient.

Questioning the workability of a first-use rule, the Solicitor General marshalls four cases in which the Securities and Exchange Commission encountered some difficulty in using Convention procedures to obtain evidence located abroad.[34] These cases, however, all involved discovery against non-parties (ac-

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[32] *See* Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States,* 13 Int'l Law. 35, 41 (1979); Brief for Amicus Curiae the Republic of France in Support of Petitioners at 21-22; Brief for Petitioners at 10-11, 39.

[33] Respondents' suggestion that France's reservation under article 23 of the Convention makes resort to the Convention futile is belied by the Republic of France's explanation of its policies with regard to the production of documentary evidence. France has told the Court that its declaration under article 23 does not impede international judicial assistance but is only intended to limit unfocused demands for documents by foreign lawyers acting without court supervision. Brief of Amicus Curiae the Republic of France in Support of Petitioners at 22-23 and Appendix A.

[34] *See* Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 15-19.

cused of complicity in securities fraud) by a U.S. administrative agency. As the Solicitor General's brief suggests, the SEC's experience with the Convention is atypical and bears little relevance to disputes between private parties such as that at issue here.

Where a government itself seeks evidence located in another nation, the relative sovereign interests at stake are clearly different than in the typical civil or commercial dispute between private parties. In part for that reason, there is a serious question whether cases brought by administrative agencies seeking to enforce their regulations were intended to be within the scope of the Convention at all.[35] The one French case discussed in the Solicitor General's brief, *In re Testimony of Constandi Nasser,* Trib. Admin. de Paris, 6eme section—2eme chambre, No. 51546/6 (Dec. 17, 1985), presented precisely this question.[36]

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[35] The Convention is expressly limited to "civil or commercial matters." Art. 1, Pet. App. 26a. These terms are not further defined. However, "civil law jurisdictions do not consider administrative matters—though civil in nature—to be within the purview of the term 'civil or commercial.' " *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 Int'l Legal Materials 1417, 1418 (1978). While some jurisdictions "accept the characterization as 'civil or commercial' given by the requesting authorities under their own law," others have indicated "that this determination should be made according to the views of the State addressed." *Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 24 Int'l Legal Materials 1668, 1671 (1985).

[36] By letter to the Court dated December 19, 1986, the Solicitor General has corrected the SEC's previous account of these proceedings. The *Nasser* case illustrates how far the French authorities will go to facilitate discovery that is conducted in accordance with the Convention.

In *Nasser,* a letter of request was issued by a federal district court to obtain the testimony of a non-party witness. The French Ministry of Justice expeditously approved and forwarded the letter for execution, but execution was delayed by collateral attack, first before the Ministry of Justice and then through appeal to an administrative court. The

The difficulty experienced by the SEC in obtaining evidence abroad through the Convention is not an argument against a general requirement of first-use. Each of the cases cited by the Solicitor General involved an uncooperative foreign non-party witness over whom U.S. courts appear to have had no jurisdiction. Thus, domestic discovery procedures were not available to the SEC either in the first instance or as a last resort, and the witnesses had strong incentives to avoid the SEC's questions. Greater cooperation can reasonably be expected from parties to commercial disputes who intend to continue doing business in the United States and who are within the reach of U.S. courts.

III

RESPONDENTS' ARGUMENTS THAT THE CONVENTION DOES NOT APPLY TO THE DISCOVERY SOUGHT IN THIS CASE ARE INCORRECT

Respondents repeat the arguments of the decision below that the Hague Evidence Convention has no applicability to this case. These arguments lack support in the language and history of the Convention, and they have been rejected by every signator to the Convention which has made its views known to the Court, including the United States.

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witness argued that the requests by the SEC were "administrative" rather than "civil" and thus outside the scope of the Convention. This raised a question of first impression as to which the language and negotiating history of the Convention leave room for divergent interpretations. The Ministry of Justice ruled against the collateral attack and opposed the appeal, seeking execution of the letter on behalf of the SEC. The administrative court held in the French government's and the SEC's favor. By then, however, the SEC was in the process of settling the underlying litigation in the U.S., and further action on the letter was not sought.

The presence of a question of first impression accounts for the delays encountered by the SEC in obtaining execution of its letter of request. In cases like the present one where no novel jurisdictional issues are present, prompt and effective execution can be expected. *See* Brief of Amicus Curiae the Republic of France in Support of Petitioners at 21.

Respondents advance the geographic fiction that the Convention is inapplicable to "preparatory acts" in France so long as the physical production of evidence occurs in the United States. There is no distinction to be found in the Convention's language or history between "preparatory acts" and the physical delivery of evidence to an opposing litigant. The discovery sought requires actions to be taken in French territory, and French law regards these actions as intrusions on its sovereignty. In urging the distinction between "preparatory acts" and the physical production of evidence, respondents are inviting the Court both to disregard the parties' construction of the treaty and also to substitute its view of French sovereign interests for those of the sovereign itself.

The claim that the Convention does not apply where a U.S. court has in personam jurisdiction over a foreign party also invents a distinction not found in the treaty or its history. The language of the Convention draws no distinction between parties and non-parties to litigation. It refers only to "persons" (articles 3 and 21) and "nationals" (articles 15 and 16). The drafting history of the Convention makes abundantly clear that its provisions apply equally to parties and non-parties. *See* Brief for Petitioners at 17-19.

The Solicitor General has told the Court that the decision below erred in its conclusion that the Convention has no applicability to the discovery requests here at issue.[37] The governments of France, Germany and the United Kingdom have also indicated that they regard the Convention as applicable to requests of this nature.[38] The decision below and the arguments of respondents are at odds with this practical construction of the treaty adopted

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[37] *See* Brief for the United States and the Securities and Exchange Commission as Amici Curiae at 7-10.

[38] *See* Brief of Amicus Curiae the Republic of France in Support of Petitioners at 8-12; Brief for the Federal Republic of Germany as Amicus Curiae at 5-6; Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners at 8.

by the contracting parties. *See Air France v. Saks*, 470 U.S. 392, 396 (1985).

CONCLUSION

Use of Hague Evidence Convention procedures should be required, both on the facts of this case and as implementation of a general rule. Accordingly, the judgment of the court of appeals should be vacated and the case remanded with appropriate instructions.

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